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Nos. 94-1557 and 94-1800

In the Supreme Court of the United States

OCTOBER TERM, 1994

HERCULES INCORPORATED, PETITIONER

v.

UNITED STATES OF AMERICA

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States may be held liable under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9607(a), as a person that "operated," or "arranged for [the] disposal * * * of hazardous substances" at, a facility used by petitioner Hercules Incorporated to manufacture the defoliant Agent Orange for sale to the government.

2. Whether Section 707 of the Defense Production Act, 50 U.S.C. App. 2157, provides petitioner Hercules with immunity from, or requires the United States to indemnify it for, liability under CERCLA for environmental contamination caused by its manufacture of Agent Orange.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18)[1] is reported at 46 F.3d 803. The opinion of

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[1] Citations are to the appendix to the petition in No. 94-1557.

the district court (Pet. App. C1-C13) is reported at 841 F. Supp. 884.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1995. The petition for a writ of certiorari in No. 94-1557 was filed on March 21, 1995, and the petition in No. 94-1800 was filed on April 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed suit against petitioners Hercules Incorporated and Vertac Chemical Corporation, among others, under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, to recover the cost of remedying environmental contamination at a former chemical manufacturing site located in Jacksonville, Arkansas. These petitions arise out of the denial of petitioners' motions seeking summary judgment that the United States is jointly liable for the costs at issue under CERCLA, and that Section 707 of the Defense Production Act of 1950, 50 U.S.C. App. 2157, either shields petitioner Hercules from liability or requires that the United States indemnify Hercules for liability incurred by reason of its use of the Jacksonville site to manufacture the herbicide Agent Orange for sale to the government. The district court granted the government's cross-motion for summary judgment that the United States was not liable as an "operator" or "arranger" with respect to the Jacksonville facility, and that the Defense Production Act did not provide for the immunity or indemnity claimed by Hercules. The court

entered final judgment on those issues under Fed. R. Civ. P. 54(b), and the court of appeals affirmed.

1. The 93-acre manufacturing site involved in this case has been on the Environmental Protection Agency's national priority list since 1983. 40 C.F.R. Pt. 300, App. B (1993); see also *United States* v. *Vertac Chemical Corp.*, 489 F. Supp. 870, 873-874 (E.D. Ark. 1980). Petitioner Hercules acquired the property and its manufacturing facilities in December, 1961, and continued to use it to manufacture the herbicides 2,4-D and 2,4,5-T. Pet. App. A3. Shortly after purchasing the property, Hercules began disposing of waste left by the prior owner by digging trenches on the property, pushing the drums of waste into them, covering them with soil, and compacting the buried drums by repeatedly running over them with a bulldozer. Pet. App. C2; C.A. App. 2611 (Hercules Fact ¶ 142). Hercules used the same disposal practices during the ten years that it produced herbicides at the facility. Pet. App. A5. Petitioner Vertac's corporate predecessor began leasing the property from Hercules in 1971, and Vertac purchased it in 1976. Vertac closed the facility in 1986.

The manufacture of 2,4,5-T produces small amounts of a highly toxic by-product known as dioxin. Pet. App. A3 n.5. Early production processes used at the Jacksonville site incorporated most of the dioxin into the finished product, which was then shipped elsewhere. Petitioner Hercules later changed its production process, however, to remove the dioxin, producing manufacturing wastes containing most of the dioxin previously found in the final product.

Hercules sold its herbicide products, including 2,4-D and 2,4,5-T, to commercial customers during

the entire period that it operated the Jacksonville site. Pet. App. A6. Beginning in 1964, however, Hercules also submitted and won competitive bids for fourteen successive contracts to supply the United States with special mixtures, known as Agent Orange and Agent Purple, compounded from particular forms of 2,4-D and 2,4,5-T and used as defoliants by government forces operating in Vietnam. Pet. App. A3-A4; C.A. App. 2591-2593 (Hercules Fact ¶¶ 89, 95). The government contracts specified the proper form, packaging, labelling, and delivery of the desired product. Pet. App. A4.

Each of the government contracts, orders, and directives under which petitioner Hercules manufactured herbicides for the government included a "rating" allowing it to take priority over other contracts or orders. Each bidding package and contract set forth the applicable rating terms among many other standardized conditions, ranging from auditing and equal opportunity provisions to "buy American" certifications. Pet. App. A4; C.A. App. 2591 (Hercules Fact ¶ 90); C.A. Supp. App. 27-64 (bidding and contract forms); see *id.* at 29, 36. Each bidding package also contained provisions for withdrawing or altering bids. *Id.* at 30, 33. When Hercules returned bidding documents, they included the delivery schedule and defense order rating, price, and all other significant terms. The government then provided opportunities for negotiation of some of the contract terms. Pet. App. A4.[2]

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[2] Through its rated contracts with the United States, petitioner Hercules was able to obtain a priority from its suppliers for materials that would be used to fulfill the rated government contracts. Pet. App. A4. In March 1967, after

Becoming a government contractor also subjected Hercules to the terms of the Walsh-Healey Act. Pet. App. A4. That Act generally requires federal supply contracts involving more than $10,000 to stipulate, *inter alia*, that

> no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract.

41 U.S.C. 35(e). The Act also requires the contractor to pay minimum wages, to abide by forty-hour work week requirements, and not to hire minors or convicts. 41 U.S.C. 35.[3] Under its contracts, Hercules was required to comply with occupational health and safety standards promulgated by the Department of Labor. See 41 C.F.R. Pt. 50-204 (1963); 25 Fed. Reg. 13,809 (1960). Applicable regulations allowed the Department of Labor to conduct random inspections to monitor compliance with those standards. 41 C.F.R Pt. 50-205.9 (1963). Labor Department offi-

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petitioner had installed certain new equipment for which it had requested and obtained such priority delivery, the government issued a directive to Hercules to accelerate delivery of Agent Orange to a rate of 65,000 gallons per month. C.A. App. 2595 (Hercules Fact ¶ 102); Pet. App. A5.

[3] The Walsh-Healey Act is still in effect, but its worker safety provisions were incorporated into the more generally applicable Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*

cials inspected the Jacksonville plant on two occasions during the four years that Hercules supplied defoliants to the government. Pet. App. A4-A5.

None of the supply contracts between the United States and Hercules addressed the disposal of hazardous substances. Pet. App. A5. Hercules buried wastes generated by its production processes before entering into its first government contract, and it continued to do so after filling its last government order. See Pet. App. A5-A6. Hercules personnel made decisions concerning waste disposal without direction of any kind from the United States. *Id.* at A6. Hercules never consulted government personnel involved in administering the supply contracts regarding burial or other waste disposal practices at the facility. C.A. App. 2612 (Hercules Fact ¶¶ 148-149).

The United States never participated in the management of petitioner Hercules' manufacturing facility. The government did not hire, train, manage, discipline, or fire petitioner's personnel. Pet. App. A5. It did not participate in accounting or bookkeeping activities, or share in profits or losses. It did not own any of the land, buildings, equipment, tools, or machinery used by petitioner. *Ibid.* The government did not design or implement petitioner's production process; it did not design, engineer or install production equipment; and it did not supply or own any of the raw materials that went into the product it purchased from petitioner. *Ibid.* Indeed, petitioner protected some aspects of its production process as proprietary information. *Ibid.*

Hercules made a profit for performing each rated contract for the supply of Agent Orange. Pet. App.

A6. After the government terminated its contracts for Agent Orange, Hercules continued producing similar commercial herbicides at the Jacksonville site. *Ibid.*

2. In 1980—before the enactment of CERCLA—the Environmental Protection Agency and the Arkansas Department of Pollution Control and Ecology entered into a consent order with petitioners Hercules and Vertac to address environmental contamination at the Jacksonville site. The district court approved that consent decree in January 1982. See *United States* v. *Vertac Chemical Corp.*, 588 F. Supp. 1294 (E.D. Ark. 1984). That decree did not succeed in resolving conditions at the site, however, and in 1992 the United States asserted CERCLA cost recovery claims against Hercules, Vertac, and others.

With one exception not relevant here, the district court has ruled on the liability aspect of all of the government's claims against private parties for CERCLA recovery costs. In particular, the court has granted summary judgment against petitioners Hercules and Vertac, among others, on the issue of liability (C.A. App. 6006-6010), leaving a variety of cost and allocation issues pending before the district court. Petitioners, however, also asked the district court to hold that CERCLA renders the United States liable for some share of the remedial costs, on the ground that, by means of its contracts for the supply of Agent Orange, the government either "operated" the Jacksonville facility or "arranged for disposal or treatment [there] * * * of hazardous substances owned or possessed by [the government]." 42 U.S.C. 9607(a)(2) and (3). Petitioner Hercules also claimed that Section 707 of the Defense Production Act (DPA), 50 U.S.C. App. 2157, either shielded it from,

or required the United States to indemnify it for, any CERCLA liability it might have incurred by using the Jacksonville site to manufacture Agent Orange.

The district court granted the government's cross-motion for summary judgment, holding that on the undisputed facts of this case the United States was neither an "operator" nor an "arranger" for purposes of CERCLA liability.[4] The court noted that the government never participated in actual management or daily operations of Hercules' manufacturing facility; never supplied, owned, or possessed the raw materials used to manufacture Agent Orange; and never dictated the manner in which Hercules was to dispose of manufacturing wastes. Pet. App. C9-C12. In sum, the court held that the government had no "authority over or involvement with Hercules' operations and decisions concerning the plant and the disposal of wastes." *Id.* at C12. The court rejected (*id.* at C11) petitioners' claim that any "compulsion" exerted by the United States under the Defense Production Act resulted in CERCLA liability on the part of the government: despite the government's power to require priority performance, the court held that for CERCLA purposes "the relationship between the United States and the contractor under the DPA

[4] The court held that there were questions of fact concerning the government's potential liability as the "owner" of an ordnance manufacturing facility located at the Jacksonville site during World War II. Pet. App. C12 n.4. The government has since settled claims of liability arising from that period by agreeing to pay $1.9 million toward the cost of restoring the site. See 59 Fed. Reg. 13,749 (1994). No objection or public comment was received concerning that settlement, and the district court approved it on June 30, 1994.

is one of buyer and seller." *Id.* at C10. The district court also rejected, without discussion, the argument that Hercules should be immunized from or indemnified for CERCLA liability under Section 707 of the DPA. *Id.* at C12.

The court of appeals affirmed. Pet. App. A1-A18. Applying the standard adopted by the full Third Circuit in *FMC Corp.* v. *United States Dep't of Commerce*, 29 F.3d 833, 843-845 (1994), the court held that the government's purchase of Agent Orange through rated contracts did not make it an "operator" of the Jacksonville facility for purposes of CERCLA because the facts revealed no "actual" and "substantial" control of the facility by the government. Pet. App. A8. The court noted in particular the absence of several factors found relevant in *FMC*, including "considerable day-to-day control," management and supervision of workers, and compulsion to produce a completely new product using new manufacturing processes. *Id.* at A9-A10. In this case, by contrast, the court concluded that "it cannot genuinely be disputed that the United States was never actively involved on a regular basis in, and thus never exerted substantial control over, operations at the Jacksonville facility." *Id.* at A10. The court found the health and safety regulations imposed by the Walsh-Healey Act "insufficient bases for imposing CERCLA liability on the United States." *Ibid.*

The court of appeals similarly rejected petitioners' claim that the United States should be held liable as an "arranger" under CERCLA. Pet. App. A11-A15. After noting that "arranger" liability requires proof that the defendant "owned or possessed" hazardous substances, the court explained that "a governmental entity may not be found to have owned or possessed

hazardous substances under [42 U.S.C.] § 9607(a)(3) merely because it had statutory or regulatory authority to control activities which involved the production, treatment or disposal of hazardous substances." Pet. App. A12. The court rejected petitioners' argument that the terms of the Agent Orange supply contracts gave the government sufficient authority over petitioner Hercules to warrant holding that the government controlled the disposal of production wastes: Without ruling out the possibility that a government contract might involve "sufficient coercion or governmental regulation and intervention to justify the United States' liability as an arranger under CERCLA," the court held that "the undisputed facts of the present case do not support such a finding." *Id.* at A13. Similarly, without denying the ability to look beyond mere form in evaluating ownership or possession of hazardous materials, the court concluded that on the facts of this case the United States could not be held to have owned or possessed the raw materials obtained by Hercules or the work-in-process inventory that generated the wastes disposed of at the Jacksonville site. *Id.* at A14-A15.[5]

Finally, the court of appeals agreed with the reasoning of the Federal Circuit in *Hercules Inc.* v. *United States*, 24 F.3d 188, 203-204 (1994), cert. granted, 115 S. Ct. 1425 (1995) (No. 94-818), that Section 707 of the DPA "does not shield Hercules

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[5] The court of appeals declined to address the government's argument that the waiver of sovereign immunity in CERCLA did not permit the United States to be held liable on the basis of its regulatory activities under the Walsh-Healey Act. Pet. App. A15 n.10.

from liability it may have under CERCLA arising out of its performance of the Agent Orange contracts because such immunity would exceed the risk imposed by" the operative provisions of the DPA. Pet. App. A17. Moreover, having concluded that the DPA confers no immunity, the court also rejected the claim that the United States "implicitly promised to indemnify Hercules for the type of liability at issue in the present case." *Ibid.*

ARGUMENT

1. a. Petitioners contend (94-1557 Pet. 19-23; 94-1800 Pet. 19-21) that the courts of appeals have adopted different standards for determining "operator" liability under Section 107(a)(2) of CERCLA, 42 U.S.C. 9607(a)(2). As petitioners concede, most courts have imposed such liability only after finding that a party exercised substantial actual control over a particular facility. *E.g.*, *FMC Corp.* v. *United States Dep't of Commerce*, 29 F.3d 833, 843 (3d Cir. 1994) (en banc).[6] That is the standard that the court of appeals applied in this case. Pet. App. A7-A11. Petitioners argue, however, that the Fourth Circuit's statement in *Nurad, Inc.* v. *William E. Hooper & Sons Co.*, 966 F.2d 837, 842, cert. denied, 113 S. Ct. 377 (1992), that "authority to control—not actual control—[is] the appropriate standard"

[6] See also *United States* v. *Gurley*, 43 F.3d 1188, 1193 (8th Cir. 1994); *Sidney S. Arst Co.* v. *Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 421 (7th Cir. 1994); *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); *Riverside Market Dev. Corp.* v. *International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir.), cert. denied, 502 U.S. 1004 (1991); *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985).

for operator liability creates a conflict of authority that requires resolution by this Court.

Nurad rejected claims of operator liability against former corporate tenants that, the court concluded, neither had nor exercised any authority over underground storage tanks on the contaminated property. *Nurad*, 966 F.2d at 843-844. In *United States* v. *Carolina Transformer Co.*, 978 F.2d 832, 836-837 (4th Cir. 1992), the same court affirmed judgments against a sole shareholder who admitted that he was "in charge" of the facility and "responsible" for the property in question, and against a director who admitted that "he operated or otherwise controlled operations on the property in question."[7] Neither case turned on any practical difference between the "actual control" and "authority to control" standards; indeed, *Nurad* cited, with apparent approval, two cases from other circuits that focused on the defendants' "actual conduct." 966 F.2d at 842.

Moreover, the discussion in *Nurad* makes clear that the Fourth Circuit's verbal formulation was intended primarily to impose liability on parties who willfully failed to act to prevent or mitigate environmental damage. *Nurad*, 966 F.2d at 842 (standard "properly declines to absolve from CERCLA liability a party who possessed the authority to abate the damage caused by the disposal of hazardous sub-

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[7] *Carolina Transformer* also relied explicitly (978 F.2d at 837) on the district court's recitation of the evidence, which included findings that one of the individual defendants "personally directed" operations at the facility, while the other incorporated a new business and surreptitiously continued repair and rebuilding work that caused environmental contamination. *United States* v. *Carolina Transformer Co.*, 739 F. Supp. 1030, 1033-1034 (E.D.N.C. 1989).

stances but who declined to actually exercise that authority by undertaking efforts at a cleanup."). As petitioner Hercules points out (94-1557 Pet. 20), that intention is consistent with prior cases from the court below. See *United States* v. *Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1382 (8th Cir. 1989). In the absence of more persuasive evidence that the courts are reaching (or even are likely to reach) inconsistent results on comparable facts, any difference in their expression of the applicable standard does not warrant intervention by this Court.

b. Petitioners also contend (94-1557 Pet. 25-28; 94-1800 Pet. 23-25) that the court of appeals' application of the "actual control" standard in this case conflicts with the Third Circuit's application of the same standard to different facts in *FMC Corp.* v. *United States Dep't of Commerce*, *supra*. As petitioners acknowledge (94-1557 Pet. 25; 94-1800 Pet. 23), the court below expressly adopted (Pet. App. A7) *FMC*'s articulation of the appropriate legal rule. Applying that rule, the court concluded that in this case, unlike in *FMC*, the United States did not "operate" the Jacksonville facility for purposes of CERCLA, because the government's contractual relationship with petitioner Hercules did not give it "actual or substantial control" (Pet. App. A11) of the facility and its waste disposal practices. The court's conclusion necessarily rests on "a fact-intensive inquiry and consideration of the totality of [the] circumstances." *Id.* at A8. In this Court, petitioners argue that the factual differences between this case and *FMC*, which the court of appeals found dispositive, were instead "immaterial" (94-1557 Pet. 25). That inherently fact-bound question does not merit further review.

In any event, whatever the merits of the *FMC* court's own conclusion on the facts of that case, the court of appeals properly distinguished this case from *FMC*. Pet. App. A8-A11; see generally C.A. App. 2848-2854 (comparison of factual findings). In this case, the United States was not "directly and entirely responsible for introducing a new manufacturing process" that generated hazardous wastes (Pet. App. A10); rather, the government contracted with petitioner Hercules to purchase a product compounded from "shelf-items," already produced by Hercules and commonly marketed in the private sector. See *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 817 (E.D.N.Y. 1984); see also *Ryan* v. *Dow Chemical Co.*, 781 F. Supp. 934, 950 (E.D.N.Y. 1992) ("The government sought only to buy ready-to-order herbicides."). The government did not ask or order Hercules to expand; it did not finance equipment purchases or own equipment outright; it did not supervise the construction of expanded facilities; and it did not help Hercules find or house its labor force. Compare Pet. App. A9 (quoting *FMC*, 29 F.3d at 843). Moreover, in this case the government did not "exert[] considerable day-to-day control over [the manufacturer] during the relevant time period" (Pet. App. A10, quoting *FMC*, 29 F.3d at 844); to the contrary, "it cannot genuinely be disputed that the United States was never actively involved on a regular basis in, and thus never exerted substantial control over, operations at the Jacksonville facility while Hercules was producing Agent Orange." Pet. App. A10.

The record therefore supports the court of appeals' conclusion that the government's contacts with Hercules—regulatory and contractual—were markedly fewer and less significant than those at issue in

FMC. There is no reason to speculate that the *FMC* court would have reached a different result on the facts of this case.

2. Petitioners argue (94-1557 Pet. 24-29; 94-1800 Pet. 25-28) that the court of appeals erred in holding that the government was not liable in this case as an "arranger" under Section 107(a)(3) of CERCLA, 42 U.S.C. 9607(a)(3). Much of that argument centers on a claim that the decision below is inconsistent with prior decisions from the same court of appeals. See 94-1557 Pet. 19-20, 24-25 (citing *United States* v. *Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 743 (8th Cir. 1986) (*NEPACCO*), cert. denied, 484 U.S. 848 (1987), and *United States* v. *Aceto Agric. Chem. Corp.*, *supra*). That is not an appropriate ground for review by this Court. See, *e.g.*, *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

In any event, the decision below is both correct and consistent. The court of appeals held (Pet. App. A11-A15) that the United States could not be held liable for "arrang[ing]" disposal of Hercules' production wastes because neither the government's regulatory powers under the Walsh-Healey Act, 41 U.S.C. 35, nor its contractual relationship with Hercules gave it "owne[rship] or "possess[ion]," for CERCLA purposes, of the hazardous substances that Hercules produced. 42 U.S.C. 9607(a)(3). In reaching that conclusion, the court discussed and properly distinguished (Pet. App. A12-A15) its prior decisions in *NEPACCO*, which held that a corporate employee could constructively "possess" hazardous materials if he "actually knew about, had immediate supervision over, and was directly responsible for arranging for the transportation and disposal of" them

(810 F.2d at 743), and *Aceto*, which concluded on particular facts that the defendant had continued to own (and thus control) materials that it sent to another party for processing (872 F.2d at 1381-1382).

In this case, by contrast, the government "did not immediately supervise, or have direct responsibility for, the transportation or disposal of any hazardous substances generated" by Hercules in Jacksonville, either by law or by contract (Pet. App. A13); nor did it own, possess, or supply either the raw materials used by Hercules or the company's work-in-process inventory (*id.* at A14-A15). The court of appeals therefore correctly concluded (*id.* at A15) that the government's "sporadic and minimal" involvement in the operation of the Jacksonville facility could not support a finding that the government "owned or possessed" Hercules' wastes and "arranged for [their] disposal" within the meaning of Section 107(a)(3).[8]

3. Petitioners Vertac and Arkansas urge the Court to grant review in order to consider the argument made by the government below (see Gov't C.A. Br. 32-38) that CERCLA's waiver of sovereign immunity (42 U.S.C. 9620(a)(1)) does not extend to any claim based on the government's unique responsibilities or powers under the Walsh-Healey Act and the Defense Production Act. 94-1800 Pet. i, 8-10, 12-19. Petitioners do not identify any conflict among the courts of appeals on this issue, and we are aware

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[8] Petitioner Hercules suggests (94-1557 Pet. 23-24) that the decision below on "arranger" liability may conflict with decisions of the Ninth and Second Circuits. Petitioner does not explain in what respect the decisions are inconsistent, and in our view they are not.

of none. See *FMC Corp.* v. *United States Dep't of Commerce*, 29 F.3d at 838-842 (rejecting sovereign immunity argument under CERCLA). In any event, we agree, in general, with petitioners' contention that a court should determine jurisdictional issues before proceeding to the merits. And we agree that if the Court were to grant review in this case, the sovereign immunity issue would present a necessary and preliminary inquiry, which might obviate the need to reach other issues raised by petitioners. Nonetheless, the court of appeals declined to address the government's sovereign immunity argument in this case. Pet. App. A15 n.10. Petitioners therefore effectively prevailed on that issue in the court below, and it is not an appropriate ground on which they may seek further review. See *California* v. *Rooney*, 483 U.S. 307, 311-314 (1987).

4. Petitioner Hercules contends (94-1557 Pet. 29-31) that Section 707 of the Defense Production Act, 50 U.S.C. App. 2157, provides it with "immunity for, and therefore an implied indemnity against, CERCLA liability" (94-1557 Pet. 29).

a. The court of appeals properly rejected petitioner's immunity claim. Pet. App. A15-A17. Whatever the merits of that claim, it is not properly presented here. Petitioner appears to have asserted a DPA immunity defense in its initial answer to the government's complaint against it. See Answer and Counterclaim of Hercules Incorporated 3 (E.D. Ark. No. LR-C-92-137). The issue of liability in that action has since been resolved by the district court's entry of summary judgment against petitioner (C.A. App. 6006-6010), but that judgment has not become final, both because of remaining liability issues involving

other parties, and because of cost determination and allocation issues that remain pending before the district court. This petition, by contrast, arises from a counterclaim brought by petitioner against the government. See Pet. App. C1, D1; C.A. App. 824, 838-839. Only a claim for indemnity by the United States—not a claim for immunity from petitioner's own liability under CERCLA—could constitute one of the "claims against the United States" on which the judgment at issue here was entered. Pet. App. D1.

b. The court of appeals also correctly rejected petitioner's claim of an "implied indemnity" under Section 707. Pet. App. A17. Moreover, petitioner has never made clear either the legal source of its claim, or the jurisdictional basis for consideration of that claim by the district court.

Petitioner has disclaimed the existence of any contractual right to indemnity. Hercules C.A. Br. 48 ("Here, there is no contract of indemnification."). In the court of appeals, petitioner argued instead that the "public polic[ies]" underlying CERCLA and the DPA "intersect to form an implied indemnity by the United States." *Id.* at 49. That novel theory depends on the resolution, in favor of petitioner, of the other questions on which petitioner seeks review here —the United States' liability under CERCLA, and petitioner's immunity under the DPA. Those questions do not, as we have explained, warrant further proceedings in this case; and petitioner's derivative indemnity claim provides no independent basis for review.

In any event, whatever the source of petitioner's claim, it seeks recovery of more than $10,000, and therefore falls within the exclusive jurisdiction of the United States Court of Federal Claims. See 28

U.S.C. 1491(a)(1); see also 28 U.S.C. 1346(a)(2). If petitioner believes that Section 707 entitles it to indemnity from the United States for any liability it has incurred under CERCLA by reason of its manufacture of Agent Orange, it must wait for that liability to be finally determined, and then bring a claim against the United States in the appropriate forum.

The point is illustrated by the history of litigation over tort liability for alleged defects in the Agent Orange manufactured by petitioners and others. Petitioner ultimately settled the tort claims against it —after having properly raised the DPA immunity issue as a defense to liability in those actions. See *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 843-845 (E.D.N.Y. 1984) (discussion of DPA claim in opinion approving settlement), aff'd, 818 F.2d 145 (2d Cir.), cert. denied, 484 U.S. 1004 (1988). Petitioner then sought to recover its costs of litigation and settlement from the United States by filing a new action, based on a variety of contractual theories, in the Court of Federal Claims. Although petitioner raised no DPA indemnity claim in that litigation, another party did advance an indemnity argument based on Section 707. Both the Court of Federal Claims and the Court of Appeals for the Federal Circuit rejected that theory, but this Court has since granted review in the case, which is now awaiting briefing and argument. *Hercules, Inc.* v. *United States*, No. 94-818.

This Court's decision in No. 94-818 might well shed light on the legal merit of the DPA indemnity claim that petitioner seeks to raise here, in No. 94-1557. Nothing in the Court's decision, however, will remedy any jurisdictional defect in this case, or ren-

der appropriate for review in this case the CERCLA and DPA immunity issues on which the indemnity theory framed by petitioner depends. There is therefore no reason to hold the petition in No. 94-1557 pending argument and decision of No. 94-818.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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